

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEVEN MIRANDA,

Plaintiff and Appellant,

v.

GASLAMP TAVERN OCEANVIEW  
SERIES, LLC, et al.,

Defendants and Respondents.

G043982

(Super. Ct. No. 30-2007-00100468)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Richard W. Luesebrink, Judge. (Retired judge of the Orange Super. Ct. assigned by the  
Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Eisenberg & Associates, Michael B. Eisenberg and Michael Kopple for  
Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, H. Gilbert Jones, William John Rea, Jr.,  
and Joseph C. Owens for Defendants and Respondents.

\*

\*

\*

## INTRODUCTION

One evening in July 2007, plaintiff Steven Miranda was conversing with a woman at OC Tavern (the “dba” for defendant Gaslamp Tavern Oceanview Series, LLC) in San Clemente when defendant Frederick Edward Smith, an off-duty security guard who worked for OC Tavern, approached Miranda. Smith pushed Miranda, placed him in a chokehold, and dragged him down some stairs, causing him to suffer serious injuries, including a broken jaw. The jury returned a special verdict finding Smith liable to Miranda for over \$300,000 in damages, including \$130,150 for future economic damages but zero for noneconomic damages; judgment was entered against Smith accordingly. The jury also found Smith’s off-duty conduct was not “conceivably of some benefit to OC TAVERN,” and judgment, therefore, was entered in favor of OC Tavern and its owner, defendant Michael Paul Merrigan.

The trial court denied Miranda’s motion for judgment notwithstanding the verdict (JNOV motion), in which Miranda argued insufficient evidence supported the jury’s finding that Smith’s conduct was not conceivably of some benefit to OC Tavern. The court also denied Miranda’s motion for a new trial brought on grounds, *inter alia*, the jury failed to follow instructions, insufficient evidence supported the court’s findings, and the court failed to provide sufficient clarification in response to the jury’s inquiries during its deliberations.

The trial court conditionally granted the motion for a new trial on the alternative ground the jury awarded inadequate damages within the meaning of Code of Civil Procedure section 662.5, subdivision (a)(1). (All further statutory references are to the Code of Civil Procedure unless otherwise specified.) The court ordered a new trial on damages to be held unless Smith agreed to an additur of \$300,000 in future noneconomic damages. Smith consented to the additur, the motion for a new trial was denied, and the judgment was amended accordingly.

We affirm. The trial court did not err by denying the JNOV motion and the motion for a new trial. As explained in detail *post*, (1) substantial evidence supported the jury's findings, (2) the record does not show the jury failed to follow instructions, (3) no admissible evidence shows the jury otherwise misunderstood or misapplied the law, (4) the trial court responded properly to the jury's inquiry by directing the jury to the applicable jury instruction, and (5) the trial court properly addressed the inadequate future noneconomic damages by amending the judgment to award Miranda additional damages in accordance with section 662.5.

### FACTS

Smith worked at the OC Tavern as a security guard. During the evening of July 12, 2007, Cassandra Renn along with a few friends walked into OC Tavern and greeted Smith. Although Smith was on duty, he "came over" to Renn and talked to her from time to time. At some point in the evening, either Smith gave Renn his telephone number or Renn gave Smith her telephone number.

Miranda and his friend, Adam Serna, arrived at OC Tavern around 10:30 p.m. Miranda and Serna were sitting on a bench near an outdoor fireplace when Renn walked by. Miranda said to Renn, "I like your purse." Renn laughed, thanked Miranda, and told him it was a limited edition. Smith was standing nearby and said, "I like your red panties." Miranda asked Renn how Smith knew about her panties, and Renn replied, "I don't know." Renn left OC Tavern with her friends to pick up another friend. Miranda and Serna continued to talk.

It was a slow night at OC Tavern. Smith volunteered to end his work shift early, and clocked out at 11:02 p.m. In accordance with OC Tavern's policy, which required employees to remove "any identifiable parts of [the] work uniform" as soon as they stopped working, Smith changed out of his black OC Tavern T-shirt. Off-duty

security and bar personnel were permitted to remain on the premises and “hang[] out,” but they were prohibited from performing any work duties.

Renn later returned to OC Tavern. At some point, she approached Smith and started “dancing sexually” with him.

Miranda and Serna moved to the front patio where Renn was seated and smoking a cigarette. Miranda said, “you know cigarettes are bad for you.” Renn responded, “I know,” and “kind of giggle[d].” Miranda asked Renn whom she was with, and Renn told him about her roommate whom she was dating and with whom she was having problems. Renn pointed her roommate out; he was on the dance floor, dancing with another woman.

Miranda asked Renn if she wanted to dance. She said, “no.” Miranda began to dance in front of Renn to try to make her laugh, and asked her again if she wanted to dance. Renn laughed and told Miranda she did not like to dance.

Smith told Miranda, “no means no,” and shoved him “really hard,” causing Miranda to stumble back about five feet. Serna jumped out of his seat and asked, “what’s going on?” Miranda pushed Serna away because he did not want him to fight with Smith.

Smith sprayed Serna with pepper spray, placed Miranda in a chokehold, and aggressively dragged Miranda down some stairs. Miranda lost consciousness but regained it when he found himself choking on his own blood. OC Tavern’s head of security, Brian Vangel, saw Smith with Miranda in a chokehold, but had no idea what had happened. Vangel testified he did not intervene because it was conceivable that Miranda had been the aggressor and his removal was a good thing.

Miranda suffered four jaw fractures. Several of his teeth were affected and a dental bridge was fractured. Extensive evidence was offered regarding Miranda’s hospitalization, course of treatment, complications, pain, and future medical needs. In

criminal proceedings brought against Smith, he pleaded guilty to the aggravated assault of Miranda.

## BACKGROUND

Miranda filed a second amended complaint containing claims for assault and battery against all the defendants except Merrigan; intentional infliction of emotional distress, false imprisonment, and negligence against all defendants; and negligent hiring, training, supervision, and retention of employees against all defendants except Smith.

Miranda submitted a proposed special verdict form which the trial court accepted and gave to the jury over OC Tavern and Merrigan's objections. As relevant to the issues presented in this appeal, the special verdict form asked the jury to make findings regarding three separate theories of respondeat superior liability, entitled respectively: (1) "Agency Liability Through Scope of Employment," (2) "Agency Liability Through Scope of Employment—Unauthorized Acts," and (3) "Agency Liability Through Social or Recreational Activities."<sup>1</sup> As to the third theory of respondeat superior liability, the jury was asked to make a finding whether "Smith's conduct" was "carried out with OC Tavern's stated or implied permission." The special verdict form instructed that if the jury answered yes, the jury was to make a finding whether "Smith's conduct" was "conceivably of some benefit to OC Tavern."

During deliberations, the jury inquired whether the question in the special verdict form asking if Smith's conduct was conceivably of some benefit to OC Tavern "pertain[ed] to: [ ] A.) At time of event? [ ] or [ ] B.) Afterwards knowing all the consequences?" The trial court answered the inquiry by directing the jury to the instruction it was given on agency liability for social or recreational activities that occur after work hours (CACI No. 3726).

---

<sup>1</sup> We quote the special verdict form throughout this opinion and, in so doing, omit some capitalization that appeared in the original text.

The jury returned the special verdict form in which it found no agency liability on any of the three theories. The special verdict form shows that as to the question: “Was Smith’s conduct conceivably of some benefit to OC Tavern,” nine of the jurors answered “[n]o” and three answered “[y]es.”

The jury found Smith liable to Miranda for battery and awarded Miranda (1) \$75,452 for “Past economic loss including lost earnings and medical expenses”; (2) \$130,150 for “Future economic loss including lost earnings and medical expenses”; (3) \$100,000 for “Past noneconomic loss including physical pain/mental suffering”; and (4) \$0 for “Future noneconomic loss including physical pain/mental suffering.” Judgment was entered in favor of Miranda as against Smith, and in favor of OC Tavern and Merrigan as against Miranda.

Miranda filed a motion to set aside the judgment and grant a new trial under section 657 (the new trial motion) on the grounds (1) the jury erroneously applied the law regarding whether Smith’s conduct conceivably benefited OC Tavern; (2) the trial court refused to provide adequate clarification to the jury; (3) insufficient evidence supported the jury’s findings; (4) the jury failed to follow the given instructions; and (5) the jury awarded inadequate damages. The new trial motion sought, in the alternative, an additur pursuant to section 662.5. Miranda also filed the JNOV motion on the ground insufficient evidence supported the jury’s verdict.

The trial court denied the JNOV motion. The court conditionally granted the new trial motion on the issue of damages as to Smith only, stating: “The amount of Plaintiff’s future non-economic damages (item 24d of the Judgment) arising from future economic losses including loss of earnings and medical expenses of \$130,150 (item 24b of the Judgment) was not determined and item 24d left blank.”<sup>[2]</sup> [¶] The Motion for New

---

<sup>2</sup> Our record shows a handwritten “0” at item 24d of the special verdict form. It is not clear why the trial court stated that item 24d had been left blank.

Trial will be denied if Defendant Frederick Edward Smith agrees to an additur of \$300,000 to item 24d of the Judgment.”

Smith signed and filed a stipulation stating: “After having the opportunity to discuss this issue with my private counsel and having carefully considered the Court’s ruling of June 29, 2010, I hereby agree to the additur of \$300,000 to item 24d of the Judgment herein, which results in a total award to Plaintiff of \$605,620 together with costs and interest. [¶] I agree to this because I do not want to go through another trial, (even though it is as to damages only) and because I feel that \$300,000 could be a lot less than Plaintiff could potentially get against me if the damage issue was re-litigated.” The amended judgment was entered in favor of Miranda against Smith in the amount of \$605,602, plus costs and interest, and in favor of OC Tavern and Merrigan against Miranda.

Miranda appealed.

## DISCUSSION

### I.

#### THE TRIAL COURT DID NOT ERR BY REFUSING TO VACATE THE JUDGMENT AND ORDER A NEW TRIAL.

Miranda argues the judgment should be reversed because the jury misapplied the law in completing the special verdict form and a new trial should have been ordered. Miranda also argues the trial court erred by failing to adequately respond to a question submitted by the jury during deliberations which, Miranda contends, would have prevented the jury’s misapplication of the law. He also argues insufficient evidence supported the jury’s finding that it was not conceivable OC Tavern stood to benefit from Smith’s conduct, and, thus, the trial court erred by denying Miranda’s JNOV motion based on that ground.

For the reasons we will explain, the record does not support Miranda's arguments. We begin our analysis by reviewing the applicable standards of review and general legal principles, regarding the respondeat superior doctrine, which underlie the issues Miranda raises in this appeal.

A.

*Applicable Standards of Review*

"The trial court's power to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. [Citation.] 'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.' [Citations.] On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citations.] If there is, we must affirm the denial of the motion. [Citations.] If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo. [Citation.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.) An order denying a motion for a new trial is not directly appealable but is reviewable on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

B.

*The Respondeat Superior Doctrine*

The doctrine of respondeat superior imposes vicarious liability on an employer for the torts committed by an employee acting within the scope of his or her employment, regardless of whether the employer is negligent or has control over the employee. (*Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 803.) In *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1003 (*Farmers*), the California

Supreme Court stated: ““‘[W]here the question is one of vicarious liability, the inquiry should be whether the risk was one ‘that may fairly be regarded as typical of or broadly incidental’ *to the enterprise undertaken by the employer*. [Citation.]” Accordingly, the employer’s liability extends beyond his actual or possible control of the employee to include *risks inherent in or created by the enterprise.*”

The Supreme Court further stated: “Significantly, an employer will not be held vicariously liable for an employee’s malicious or tortious conduct if the employee *substantially* deviates from the employment duties for personal purposes. [Citations.] Thus, . . . if the misconduct is not an ‘outgrowth’ of the employment [citation], the employee is not acting within the scope of employment. *Stated another way, ‘[i]f an employee’s tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior.’* [Citation.] In such cases, the losses do not foreseeably result from the conduct of the employer’s enterprise and so are not fairly attributable to the employer as a cost of doing business.” (*Farmers, supra*, 11 Cal.4th at pp. 1004-1005, first italics in original, second italics added.)

Several courts have addressed the applicability of the respondeat superior doctrine when an employee’s consumption of alcohol has resulted in that employee causing injury. Although, in this case, there is no evidence that Smith was intoxicated before injuring Miranda, the “conceivably of some benefit” language in the special verdict form, which is at issue in this appeal, comes from this line of cases. Because we conclude that judgment was properly entered in OC Tavern and Merrigan’s favor for the reasons discussed *post*, we do not need to address whether the rule applied in this line of cases applied to the facts of this case.

The general rule in those cases is that “where an employee consumes alcohol in the scope of his or her employment, the employer is liable for injuries

proximately caused to members of the public by the consumption of alcohol.” (*Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 798.) An employer is not responsible for injuries resulting from an employee’s social or recreational activities, however, that are not in some way connected to or ““broadly incidental”” to the employer’s enterprise. (*Farmers, supra*, 11 Cal.4th at p. 1003.)

In *McCarty v. Workmen’s Comp. Appeals Bd.* (1974) 12 Cal.3d 677, 680 (*McCarty*), the employees frequently remained at the workplace after work to discuss business, socialize, drink, and play poker. The owner-managers participated in such activities and often purchased alcohol with company funds. (*Ibid.*) The employees stored beer in the office refrigerator. One afternoon, the employees were allowed to stop working early to enjoy the employer’s Christmas party. (*Ibid.*) The employer provided alcohol; the employees “were in and out during the afternoon and evening.” (*Id.* at pp. 680-681.) They drank, talked, and played poker. (*Id.* at p. 680.) One employee went home and returned to the workplace with more alcohol and additional money for poker. (*Id.* at p. 681.) He left the worksite at 9:00 p.m., visibly drunk. (*Ibid.*) On the way home, he drove into a railroad signal pole and died. (*Ibid.*)

The California Supreme Court in *McCarty, supra*, 12 Cal.3d 677, concluded the employee’s attendance at the company party came “within the scope of his employment” (*id.* at p. 683), and stated, “[e]mployee social and recreational activity on the company premises, endorsed with the express or implied permission of the employer, falls within the course of employment if the ‘activity was conceivably of some benefit to the employer’” (*id.* at pp. 681-682). The Supreme Court stated that the employer’s owner-managers permitted recurrent drinking parties on the premises, routinely used company accounts to purchase alcohol, and the gatherings “served both to foster company camaraderie, and to provide an occasion for the discussion of company business,” which “conceivably” provided a benefit to the employer and thus fell within the scope of employment. (*Id.* at p. 682.)

In *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 615, 617, the appellate court concluded an employer was liable for injuries caused when intoxicated employees got into a fight after work hours. The court explained the employer derived a benefit by allowing its employees to remain on the employer's premises after their work shifts ended because the employer could conveniently recruit workers if needed for later shifts. (*Id.* at p. 620.) The appellate court observed that "where social or recreational pursuits on the employer's premises after hours are endorsed by the express or implied permission of the employer and are 'conceivably' of some benefit to the employer *or*, even in the absence of proof of benefit, if such activities have become 'a customary incident of the employment relationship,' an employee engaged in such pursuits after hours is still acting within the scope of his employment." (*Ibid.*)

C.

*The Special Verdict Form Does Not Reflect a Misunderstanding by the Jury; Substantial Evidence Supported the Jury's Findings, and the Trial Court Properly Responded to the Jury's Question Regarding Question No. 6 of the Special Verdict Form.*

As discussed *ante*, there is no evidence or contention that Smith's assault on Miranda was in any part caused by alcohol. Smith denied drinking any alcoholic beverage before the assault. Miranda proposed a special verdict form based on *McCarty* and *Rodgers v. Kemper Constr. Co.*, which, under the heading "Agency Liability Through Social or Recreational Activities," asked the jury, at question No. 5, to make a finding whether "Smith's conduct [was] carried out with OC Tavern's stated or implied permission." The special verdict form further stated that if the jury answered question No. 5 in the affirmative, the jury must answer question No. 6 that asked, "[w]as Smith's conduct conceivably of some benefit to OC Tavern?" Over OC Tavern and Merrigan's objection, the trial court accepted the special verdict form and gave it to the jury.

The jury answered "[y]es" to question No. 5, thereby finding that Smith engaged in social or recreational activities with OC Tavern's stated or implied

permission. The jury answered “[n]o” to question No. 6, finding that Smith’s social or recreational activities did not conceivably confer some benefit to OC Tavern.

Substantial evidence supported the jury’s findings in the answers to questions Nos. 5 and 6 on the special verdict form. Vangel’s testimony that OC Tavern employees, including Smith, were permitted to remain at the bar and “hang[] out” after they had clocked out supported the jury’s finding OC Tavern impliedly consented to Smith remaining on the premises and socializing after his work shift had ended.

As to whether Smith’s social or recreational activities after work were conceivably of some benefit to OC Tavern, substantial evidence supported the jury’s finding they were not. Vangel testified that employees were required to immediately remove their OC Tavern shirt and any other identifiable parts of their work uniform after they had clocked out, especially if “they’re hanging out after working.” He also testified employees were not permitted to perform work duties when they were off duty. Although Smith testified Merrigan asked him to perform some work duties after he had clocked out on July 12, the jury was free to disbelieve Smith and believe Merrigan’s testimony that he did not see Smith before the incident, much less ask him to continue to perform work duties after clocking out. Vangel testified that he was surprised when he observed Smith dragging Miranda because he knew Smith should not be performing work duties after clocking out and thus should not be removing patrons from the bar for any reason.

Miranda argues the phrase “Smith’s conduct,” as it appears in question No. 6 of the special verdict form, does not refer to Smith’s social or recreational activities, but to Smith’s conduct of removing Miranda from the bar. Miranda further argues that because Vangel testified that he thought an off-duty security guard’s removal of a patron from the bar where he works might benefit the bar if the patron was acting in an offensive or threatening manner, the jury had no choice but to find Smith’s conduct of

removing Miranda as conceivably conferring some benefit to OC Tavern.<sup>3</sup> As discussed *ante*, the language of the heading preceding questions Nos. 5 and 6 of the special verdict form, and the wording of questions Nos. 5 and 6 themselves, as well as the case law, discussed *ante*, upon which those questions are based, do not support Miranda's interpretation.

Interpreting the phrase "Smith's conduct" in questions Nos. 5 and 6 as referring to Smith's social or recreational activities is also consistent with the language used in other respondeat superior liability questions in the special verdict form. Under the heading "Agency Liability Through Scope of Employment," the special verdict form asked at question No. 1 whether "[a]t the time of the incident between [Smith] and [Miranda]," Smith was engaged in the type of conduct that was reasonably related to the kinds of tasks he was employed to perform at OC Tavern. Question No. 2 similarly asked whether "[a]t the time of the incident between Smith and Miranda," Smith was engaged in the "type of conduct that was reasonably foreseeable in light of OC Tavern's business or Smith's job responsibilities." The jury answered "[n]o" to both questions.

Under the heading "Agency Liability Through Scope of Employment—Unauthorized Acts," the special verdict form contained question No. 3 which similarly asked whether "Smith's conduct *against Miranda* [was] committed in the course of a series of acts authorized by OC Tavern." (Italics added.) Question No. 4 asked whether "Smith's conduct *against Miranda* ar[o]se from a risk inherent in or created by OC Tavern." (Italics added.) The jury answered "[n]o" to questions Nos. 3 and 4.<sup>4</sup>

---

<sup>3</sup> In his reply brief, Miranda further argues: "No one at trial disputed Vangel's testimony, as head of security for OC Tavern, that he viewed Smith's conduct as conceivably beneficial to OC Tavern at the time he gave Smith permission to eject the Plaintiff by physically grabbing and assaulting him. This shortcoming, which was drastically obvious and uncontroverted during trial, should have directed the trial court to grant a new trial."

<sup>4</sup> Miranda does not challenge the jury's findings as to questions Nos. 1 through 4 on the special verdict form in this appeal.

As discussed *ante*, the phrase “Smith’s conduct,” as used in questions Nos. 5 and 6, appears under the heading “Agency Liability Through Social or Recreational Activities,” and refers to Smith’s social or recreational activities. Miranda’s contrary reading of question No. 6 runs afoul of California Supreme Court precedent. (See *Farmers, supra*, 11 Cal.4th at pp. 1004-1005 [“‘[i]f an employee’s tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior’”]; see also *McCarty, supra*, 12 Cal.3d at pp. 681-682 [“Employee *social and recreational activity* on the company premises, endorsed with the express or implied permission of the employer, falls within the course of employment *if the ‘activity was conceivably of some benefit to the employer’*” (italics added)].)

In any event, substantial evidence showed Miranda was merely asking Renn to dance and making her laugh by dancing in front of her, when Smith pushed Miranda, put him in a chokehold, and dragged him down some stairs. As substantial evidence supported the finding Miranda had engaged in no misconduct, Smith’s conduct toward Miranda was objectively and subjectively unjustified and could not confer any conceivable benefit upon OC Tavern.

Miranda argues the trial court erred by failing to provide the jury sufficient clarification regarding question No. 6 of the special verdict form. During deliberations, the jurors asked the following question: “pg 2 Question #6 [¶] Was Smith’s conduct conceivably of some benefit to OC Tavern? [¶] Does this pertain to: [¶] A.) At time of event? [¶] or [¶] B.) Afterwards knowing all the consequences?” The trial court responded by referring the jurors to the instruction they had already received on this subject, which was entitled “Social or Recreational Activities” and stated: “Social or recreational activities that occur after work hours are within the scope of employment if:

[¶] (a) They are carried out with the employer's stated or implied permission; and  
[¶] (b) They either provide a benefit to the employer or have become customary.”

The trial court appropriately directed the jurors to the applicable instruction. Miranda does not contend the instruction fails to comport with the law. He requested that instruction. We find no error in the trial court's handling of the jury's inquiry.

Miranda argues that declarations he submitted from two jurors to support the new trial motion and the JNOV motion show that some jurors were confused by question No. 6 of the special verdict form. Each declaration included the following statements: “During deliberations, the jury discussed question 6 on the special verdict form, which asked whether Mr. Smith's actions were a ‘conceivable benefit’ to the bar. [¶] . . . The jury split into two camps on this issue, with several of us stating that the question of the ‘conceivable benefit’ was to be determined as of the time that permission was given to Mr. Smith to perform the ejection, and several of us stating that this question of ‘conceivable benefit’ was to be determined later, based upon the results of the ejection. [¶] . . . The jurors who stated that ‘conceivable benefit’ was to be determined based upon the results said that the Plaintiff's broken jaw could not be a ‘conceivable benefit.’ [¶] . . . The jury spent several days discussing this question and we actually sent a question to the Judge to find out which was the right way to apply the test. [¶] . . . After we received the response, and did not receive clarification as to how to apply ‘conceivable benefit,’ a number of the jurors voted against there [sic] being a conceivable benefit, stating their decision that ‘the result of Plaintiff having received a broken jaw was not a conceivable benefit.’”

A juror declaration that purports to establish ““deliberative error” in the jury's collective mental process,” such as confusion, misunderstanding, and misinterpretation of law, particularly regarding the way in which the jury interpreted and applied instructions, is inadmissible under Evidence Code section 1150. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1682-1684; see Evid. Code, § 1150,

subd. (a) [“No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined”]; *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 [“Evidence of jurors’ internal thought processes ordinarily is not admissible to impeach a verdict”].)

The record demonstrates the trial court properly instructed the jury and “[i]t must be assumed that the jur[ors] understood the instructions and correctly applied them to the evidence.” (*Zuckerman v. Underwriters at Lloyd’s* (1954) 42 Cal.2d 460, 478-479.) As discussed *ante*, during deliberations, the jury asked for clarification of question No. 6 and the trial court properly referred the jury to the applicable jury instruction. Miranda does not contend either the instruction or the special verdict form, both of which Miranda had proposed, was erroneous or confusing.

In sum, substantial evidence supported the jury’s findings, the record does not show the jury failed to follow instructions, no admissible evidence shows the jury otherwise misunderstood or misapplied the law, and the trial court responded properly to the jury’s inquiry by directing the jury to the applicable jury instruction. The trial court, therefore, did not err by refusing to vacate the judgment and to order a new trial.

## II.

### THE TRIAL COURT DID NOT ERR BY REFUSING TO GRANT THE NEW TRIAL MOTION.

The jury found Miranda would require future medical treatment, as evidenced by the jury’s award of future economic damages. The jury, however, awarded zero for future noneconomic damages. Miranda moved for a new trial under section 657 on the ground, *inter alia*, the jury awarded him inadequate damages.<sup>5</sup> (See, e.g., *Dodson*

---

<sup>5</sup> Section 657, subdivision 5 provides that a verdict may be vacated, and any other decision may be modified or vacated, in whole or in part, “and a new or further trial granted on all or part of the issues, on the application of the party aggrieved” for inadequate damages.

*v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 937-938 [holding jury verdict failing to compensate for pain and suffering is inadequate as a matter of law].)

Pursuant to section 662.5, subdivision (a)(1), the trial court conditionally granted the new trial motion on the issue of damages. The court ruled that the new trial motion would be denied if Smith agreed to an additur to the judgment of \$300,000 in future noneconomic damages, resulting in a total award of \$605,602, not including costs and interest. Smith stipulated to the additur, and the judgment was amended accordingly.

Miranda argues the trial court erred by failing to grant a new trial on damages. In his opening brief, Miranda argues: “The trial court made its determination as to what Miranda’s future non-economic damages are worth. However, Miranda has been deprived of the benefit of the jury’s ruling on the issue. As the juror declarations recited,<sup>[6]</sup> the jury’s inability to agree on the extent of Miranda’s future treatment precluded them from making any determination. Miranda should not be prevented from having a jury finding on this issue.”

Miranda’s argument is without merit. Section 662.5, subdivision (a)(1) provides: “In any civil action where after trial by jury an order granting a new trial limited to the issue of damages would be proper, the trial court may in its discretion: [¶] (1) If the ground for granting a new trial is inadequate damages, issue a conditional order granting the new trial unless the party against whom the verdict has been rendered consents to the addition of damages in an amount the court in its independent judgment determines from the evidence to be fair and reasonable.”

The record shows the trial court followed the procedure set forth in section 662.5, subdivision (a)(1), and conditionally granted the new trial motion, pending

---

<sup>6</sup> One of the two juror declarations discussed *ante*, stated: “We also discussed future pain and suffering. During this discussion, we also had a problem coming up with damages because some of the jurors stated that they felt Plaintiff’s jaw problems could be fixed after the first future surgery, while others stated that they felt that evidence presented indicated two future surgeries to correct Plaintiff’s problems.”

Smith's consent to the \$300,000 additur to the judgment which amount was determined by the trial court to be fair and reasonable. The amended judgment incorporating the additur almost doubled the total amount of damages awarded by the jury, and otherwise appears to be fair and reasonable on this record. We find no error.

#### DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.